IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RFA No.75 of 2001.

Judgement reserved on:16.11.2007.

Date of decision: *December 24, 2007*.

Smt.Sita Devi. ….. Appellant.

Versus

The State of H.P. …. Respondent.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] Yes

For the Appellant : Mr.V.D.Khidta, Advocate.

For the Respondent : Mr.M.L.Chauhan, Addl. Advocate General.

Kuldip Singh, Judge.

The plaintiff has filed this appeal against the judgment, decree dated 1.1.1999, passed by learned Additional District Judge, Sirmaur District at Nahan, in Civil Suit No.2-N/1 of 1997 dismissing her suit for recovery of Rs.2,10,000 on account of failure of her sterilization operation.

2. The facts in brief, as emerge from the plaint, are that appellant was married and having three children. She had undergone sterilization tubectomy operation under family planning programme. The operation was carried out by Dr.R.K.Sood, Medical Officer, who was posted at Nahan. It has been alleged that on 16.9.1989 she was

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Whether the reporters of the local papers may be allowed to see the Judgment? Yes

made to believe the correctness and accuracy of operation. Dr.R.K.Sood and his staff operated upon her negligently. The apparatus were not properly boiled. In 1993, she suspected her pregnancy, she got her examined by Dr.Lalita Prashar on 5.6.1993 at Solan. She was also examined at Sarahan. She delivered female child on 15.1.1994 who is alive and is being brought up by her and her husband. On the delivery of 4th child, there was a shock and disruption in her family. The appellant and her husband had no planning to have 4th child keeping in view their financial position. It has also been alleged that notice under Section 80 C.P.C. was served on the respondent as well as on Dr.R.K.Sood. On these grounds, she claimed Rs.2,10,000 compensation along with 12% interest per annum by filing suit on 10.1.1997.

3. The suit was contested by respondent by filing written statement in which preliminary objections of maintainability, limitation, estoppel, lack of cause of action and non joinder of necessary party, namely, Dr.R.K.Sood were taken. On merits, it has been admitted that tubectomy sterilization operation of appellant was performed by Dr.R.K.Sood on 16.9.1989. Dr.R.K.Sood had undergone training and is a qualified doctor for performing such operations. The operation was carried out with due care and caution and no negligence was committed for performing the operation. The instruments were properly sterilized. The appellant was told at the time of operation that there are some chances of failure of such type of operations, she signed the consent form which was explained to her. The respondent denied the claim of the appellant. In replication, the appellant

reiterated her stand which was taken by her in her plaint and denied the case set up by the respondent in the written statement.

4. The following issues were framed by the learned trial Judge:-

i) Whether the plaintiff is entitled to the suit amount in lieu of compensation, if so to what amount? OPP

ii) Whether the suit is not maintainable as alleged? OPD

iii) Whether the suit is time barred, as alleged? OPD

iv) Whether the plaintiff is estopped by her act, conduct and deeds to file the suit? OPD

v) Whether the plaintiff has no cause of action? OPD

vi) Whether the suit is bad for non joinder of Dr.R.K.Sood as necessary party? OPD

vii) *Relief.*

The learned Additional District Judge after conclusion of the trial dismissed the suit. Hence, this appeal.

5. I have heard Mr.V.D.Khidta, learned counsel for the appellant and Mr.M.L.Chauhan, learned Additional Advocate General, for the State. It has been submitted on behalf of the appellant that sterilization operation of the appellant was conducted negligently by the concerned doctor. The delivery of the child after the sterilization operation of the appellant in itself is proof of failure of operation which is attributable to the surgeon and concerned staff. He has submitted that appellant has proved her case on record and, therefore, she is entitled to decree, as prayed. On behalf of the State, it has been

submitted that appellant was operated by a qualified doctor trained in the field. It has been submitted that there is known percentage of failure in such type of operations. The appellant even before the operation was told that such operations are not 100% successful and after knowing these facts the appellant had undergone tubectomy sterilization operation voluntarily. She was operated upon by a qualified doctor and it is not a case of negligence but a case of failure of operation which is known in the medical field, therefore, the appellant is not entitled to any compensation. The learned Additional Advocate General has supported the impugned judgment, decree.

6. PW-1 Sita Devi has stated that she was operated by Dr.R.K.Sood about 9 years ago. The doctor used instruments which were neither sterilized nor cleaned. The doctor took 15 minutes for her operation, in other operations the doctor took about one hour. She had already three children. She wanted to go for operation. She delivered female child on 15.1.1994. She developed pain and got her examined from Dr.Lalita Prashar. PW-2 Smt.Sumitra Devi has stated nothing relevant regarding the controversy. PW-3 Pyare Lal, husband of the appellant, has stated that he was with appellant at the time of operation. The doctor performed the operation in haste. There was no facility for sterilization of the instruments. He has stated that the 4th child was born 5 years after the operation.

7. DW-1 Dr.R.K.Sood has stated that a team headed by him performed the tubectomy operation of appellant. All instruments were clean and operation was successful. He has stated that before the operation consent of every patient is taken. She was also told that

sometimes there is failure of operation. In this case also, consent Ext.DA of appellant was taken which was earlier Mark 'A'. He has stated that in the operation of the appellant he cut the tube and put the knot on both ends. He has stated that if the instruments are not properly sterilized then there is possibility of infection and failure of operation. The instruments after sterilization were used. The percentage of failure is 1 to 2% despite all precautions.

8. The learned counsel for the appellant has submitted that it is proved on record that the appellant has delivered 4th child after her tubectomy operation. This in itself is sufficient to establish the negligence of doctor in performing the operation and appellant is entitled to compensation. He has relied ***Dr.Laxman Balkrishna Joshi*** *versus* ***Dr.Trimbak Bapu Godbole and another, AIR 1969 SC 128*** and ***State of Haryana and others*** *versus* ***Smt.Santra, AIR 2000 SC 1888*** in support of his submissions and prayed for setting aside the impugned judgment and acceptance of the claim of the appellant, as pleaded by her. The argument advanced by learned counsel for the appellant is attractive but if the facts of the case are scrutinized closely then it has no force. In the plaint, the thrust of the allegations is that at the time of operation, the instruments of operation were not properly boiled and the doctor was negligent in using the apparatus and conducting operation. There is no specific allegation in the plaint regarding the nature of negligence doctor committed in performing the operation. There is no allegation in the plaint that both the fallopian tubes of the appellant were not cut or knotted properly nor such case was put to DW-1 Dr.R.K.Sood, who performed the

operation. The appellant has also not examined any expert in support of her case. The vague allegation of negligence attributed to the doctor is not the proof of negligence. It has come on record that Dr.R.K.Sood who performed the operation of appellant was a qualified doctor. He has stated that consent of appellant was taken vide Ext.DA for performing the operation. She was told the possibility of failure of such operation. The appellant accepted the risk and opted for operation. The instruments which were used in the operation on the day the appellant was operated were sterilized by the staff. There is no reason to disbelieve the statement of doctor. It is not believable that for conducting the tubectomy operations the instruments were used without sterilization. In case the instruments were not sterilized then infection would have set in immediately after the operation and not wait for 3 or 4 years. There is force in the submission advanced on behalf of the respondent that there is known history of failure of tubectomy operations to a limited extent. DW-1 Dr.R.K.Sood has stated that such failure rate is 1 to 2%.

9. In ***Dr.Laxman Balkrishna Joshi's case (supra),*** the Hon'ble Supreme Court in Para-11 has held that duties which a doctor owes to his patient are clear, which is as follows:-

> "The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care

> in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires: (cf. Halsbury's Laws of England, 3rd ed. Vol. 26 p.17). The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. … …."

It is not the case of appellant that Dr.R.K.Sood did not have necessary skill to perform the operation. The appellant was told vide Ext.DA that there is risk of failure of operation but despite that the appellant had undergone operation voluntarily. The appellant has vaguely pleaded negligence on the part of respondent and doctor in conducting operation but in evidence she has not proved specific negligence on the part of surgeon and has not brought her case within the parameters of law laid down by Hon'ble Supreme Court in above case.

10. In ***State of Haryana and others*** *versus* ***Smt.Santra (supra),*** the Apex Court has upheld the decree of recovery of money for medical negligence. In that case, it was proved on record that the operation related only to the right fallopian tube and the left fallopian tube was not touched and, therefore, complete sterilization operation

was not done. On the facts of that case, the negligence of the doctor was proved and the suit was decreed which was ultimately upheld by the Hon'ble Supreme Court. In the present case, there is no such allegation that operation of only one fallopian tube was performed and the other fallopian tube was not touched. The appellant did not produce any expert in support of her case. Therefore, ***State of Haryana and others*** *versus* ***Smt.Santra (supra),*** is distinguishable and not applicable in the facts of the present case.

11. On behalf of the respondent, it has been submitted that in such type of operations there is a known percentage of failure. This submission is supported by medical books on the subject. In ***Jeffcoate's Principles of Gynaecology (fifth edition),*** revised by ***V R Tindall, processed and published by Butterworth- Heinemann,*** on the point of reliability of sterilization operations the Author has stated as under:-

> "The only sterilization procedures in the female which are both satisfactory and reliable are: resection or destruction of a portion of both fallopian tubes; and hysterectomy. No method, however, is absolutely reliable and pregnancy is reported after subtotal and total hysterectomy, and even after hysterectomy with bilateral salpingectomy. The explanation of these extremely rare cases is a persisting communication between the ovary or tube and the vaginal vault.
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> Even when tubal occlusion operations are competently performed

> and all technical precautions are taken, intrauterine pregnancy occurs subsequently in 0.3 per cent of cases. This is because an ovum gains access to spermatozoa through a recanalized inner segment of the tube."

12. In the present case, appellant delivered the child after more than 4 years of her tubectomy operation. It appears the appellant has delivered 4th child not because of the fact that the operation was conducted negligently by Dr.R.K.Sood but due to the fact that her conception fell in rare cases and despite tubectomy operation ovum released from her ovary came in contact with spermatozoa not because of the negligence on the part of the doctor for conducting tubectomy operation but for reasons noticed by the experts for such conception. The appellant was informed vide Ext.DA that there are chances of failure of such type of operations. She was put to notice but despite that she opted for tubectomy operation but even after operation she conceived. The respondent and doctor who conducted the operation of the appellant cannot be blamed for the conception and ultimate delivery of 4th child. The appellant has failed to prove any negligence on the part of the respondent or the doctor for conducting her tubectomy operation. No case for interference is made out. Hence, the appeal dismissed. No costs.

December 24, 2007 **(Kuldip Singh)**
(soni) **Judge.**